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HUMAN DIGNITY, REMEDIES, AND LIMITATIONS IN THE CONVENTION

*Jordan J. Paust**

Certain changes or additions to the Draft Convention on the Rights of the Child¹ ("Convention") are required in order to assure that several fundamental and customary human rights norms are not slighted or denied. An effort has been made to keep both the changes and commentary to a minimum.

Of primary concern are customary norms with respect to the right to an effective remedy for the deprivation of rights, appropriate standards with respect to limitations, and the recognition that, at a minimum, a child is a person within the meaning of any human rights instrument and is entitled, as are others, to the full measure of human dignity.

I. RIGHTS TO DIGNITY AND TO AN EFFECTIVE REMEDY

Two changes should be made which will assure that the Convention will not be construed to deny or disparage the rights of any child to dignity and an effective remedy for the deprivation of such human rights. First, the third paragraph of the preamble should be modified as follows:

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein,

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1. Draft Convention on the Rights of the Child, 43 U.N. ESCOR C.4 (28th mtg.), U.N. Doc. E/CN.4/1988/28 (1988) [hereinafter Convention]. The author's references are to the Draft Convention prior to the second reading which occurred November 28, 1988 through December 9, 1988.

*including, inter alia the rights of all persons to dignity and to an effective remedy, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*²

This reaffirmation of human dignity is important, because the preamble is a part of this international agreement, as any other, and can be used to interpret other portions of the instrument. The fundamental right of all persons to dignity is not adequately assured by the second preambular paragraph,³ because today more than a "faith in" the dignity and worth of each human person is affirmed in relevant human rights instruments. Indeed, customary human rights, as reflected in part in the preamble and Articles 1, 2, 6 and 7 of the Universal Declaration of Human Rights,⁴ affirms the right

2. The text of the third preambular paragraph remained unchanged from the adoption of the Draft Convention by the United Nations Working Group in 1988 to the submission to the United Nations General Assembly in October 1989. *Compare Question of A Convention on the Rights of the Child: Report of the Working Group on a draft convention on the rights of the child*, 45 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1989/48 (1989) [hereinafter *Report of the Working Group*]; United Nations Commission on Human Rights, Commission Res. 1989/57, U.N. ESCOR Supp. (No. 2), U.N. Doc. E/1989/20, E/CN.4/1989/86 (1989); ECOSOC Res. 1989/79, Resolutions and Decisions adopted by the Economic and Social Council, U.N. Doc. E/1989/INF/7 (1989). The third preambular paragraph reads:

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Adoption of A Convention on the Rights of The Child, G.A. Res. --, -- U.N. GOAR --, U.N. Doc. A/44/616 (1989) (emphasis in original text) [hereinafter *Adoption of A Convention*].

3. The second preambular paragraph reads:

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.

Adoption of A Convention, *supra* note 2, preambular para. 2 (emphasis in original text).

4. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (1948).

of all human beings to human dignity.⁵

Similarly, the customary right of each person to an effective remedy, without which no human right would have an effective or functional meaning or existence, should be expressly referred to in order to guarantee a proper interpretation and application of the Convention, its general effectiveness, and a proper integration of the Convention with existing international norms and standards. The customary right to an effective remedy is recognized in every relevant human rights instrument, including: Article 8 of the Universal Declaration on Human Rights;⁶ Articles 3 and 14(1) of the Covenant on Civil and Political Rights;⁷ Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination;⁸ Articles 2(1), 13, and 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁹ Articles 5(5), 6, 13, and 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms;¹⁰ Articles 10, 25, and 63 of the American Convention on Human Rights;¹¹ and Articles 7 and 26 of the African Charter on Human and Peoples' Rights.¹² It is also reflected (with respect to certain persons) in the

5. *Id.* at preamble, arts. 1, 2, 6, and 7. On the right to human dignity in this country, see also Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145 (1984). On human dignity as a human right, see also M. McDougal, H. Lasswell & L. Chen, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

6. *Id.* art. 8.

7. The International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

8. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 3) at 45, 49, U.N. Doc. A/39/708 (1984) [hereinafter *Convention Against Torture*].

10. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

11. American Convention on Human Rights, "Pact of San Jose, Costa Rica," O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/ser. A/16 doc.-- (1969) [hereinafter *American Convention*].

12. African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 9, 60, 63 (1982) [hereinafter *African Charter*].

customary precept of "denial of justice."

Second, for the same reasons, and more generally, Article 41 should be altered as follows:

Nothing in the Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) the law of a State Party; or
- (b) any other international convention, treaty or agreement in force for that State or any norm of customary international law, including any relevant human right.

In particular, nothing in the Convention shall be construed to deny the fundamental human right of each person to an effective remedy in national tribunals for deprivations of their human rights, as recognized *inter alia* in the Universal Declaration of Human Rights.¹³

The first portion of such an addition has the added benefit of a "savings clause." It is certainly not the intention of the drafters to supersede any customary human rights of the child. Such a clause will assure that customary international law is not slighted or ignored, and that in the future the Convention is properly integrated with the panoply

13. Compare with Article 21 adopted by the United Nations Working Group in 1988 prior to the submission for technical review and the second reading: "[n]othing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in: (a) the law of a State Party, or (b) any other international convention, treaty or agreement in force for that State." The current text, listed in Article 41 following the renumbering of the draft Convention, is contained in the *Report of the Working Group*, *supra* note 2, art. 41, and is changed in part in the draft Convention submitted to the United Nations General Assembly: "[n]othing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in: (a) the law of the State Party, or (b) international law in force for that State." See *Adoption of A Convention*, *supra* note 2, art. 41. The change in section (b) to use the phrase "international law" will actually cover such customary rights but the suggested text is more specific.

of human rights of a customary nature, and with other customary law such as the customary laws of armed conflict or international humanitarian law mentioned in Article 38.¹⁴ Because the exact content of customary law is dynamic, such a clause should generally refer to custom and thereby provide a flexible reference to that which is guaranteed independently of the Convention but which can be utilized for interpretive purposes. Article 5(2) of the Covenant on Civil and Political Rights,¹⁵ Articles 1(2) and 16(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ Article 29 of the American Convention on Human Rights,¹⁷ and Articles 60 and 61 of the African Charter on Human and Peoples' Rights,¹⁸ have had a similar purpose.

14. *See Adoption of A Convention, supra* note 2, art. 38. Article 38, after the second reading, reads as follows:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

See Report of the Working Group, supra note 2, art. 38. This has remained unchanged through the submission to the United Nations General Assembly. *See Adoption of A Convention, supra* note 2, art. 38.

15. Covenant on Civil and Political Rights, *supra* note 7, art. 5(2).

16. Convention Against Torture, *supra* note 9, arts. 1(2), 16(2).

17. American Convention, *supra* note 11, art. 29.

18. African Charter, *supra* note 12, arts. 60, 61.

II. LIMITATION CLAUSES

All of the recommended limitation clauses¹⁹ should mirror the standards contained in other human rights instruments reflecting the "necessity within democratic limits" test.²⁰ In any such Article the phrase "in a democratic society" should appear so as to assure full incorporation of the customary standards contained *inter alia* in Article 29(2) of the Universal Declaration of Human Rights.²¹ The words "in a democratic society" should be inserted immediately after "and are necessary" as illustrated by the following example taken from Article 13(2) of the Convention:

The exercise of these rights may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary in a democratic society:

- (a) For respect of the rights and reputations of others; or
- (b) For the protection of national security or for public order (*ordre public*), or of public health or morals.²²

19. See Convention Against Torture, *supra* note 9, art. 10, para. 2, art. 13, art. 14.

20. See generally, Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test*, 9 YALE J. WORLD PUB. ORD. 178, 181-82 (1982); see also C. Grossman, *States Of Emergency: Latin America And The United States*, in CONSTITUTIONALISM AND RIGHTS 176, 187-88 (L. Henkin & A. Rosenthal eds. 1989).

21. See Universal Declaration of Human Rights, *supra* note 4, art. 29(2). See generally, Paust, *supra* note 20.

22. Cf., *Adoption of A Convention*, *supra* note 2, art. 13 (2) which states:

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights or reputation of others;
- (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

Id.

III. CONCLUSION

In general, the Convention will provide useful clarification and refinement of the human rights and special needs of children. It is an important contribution to human rights law and should help to assure greater dignity and protection for more than half of the earth's human population. The "savings clause" in Article 41(b)²³ assures that the norms of customary international law cannot lawfully be slighted by those who become signatories of the convention. Further, Article 103 of the United Nations Charter²⁴ presently guarantees that human rights protected by the Charter, including customary rights noted above, shall take precedence.

23. *See supra* text accompanying note 13.

24. U.N. CHARTER art. 103.